Supreme Court of the United States

500

OCTOBER TERM, 1948.

No. 500.

THE UNION NATIONAL BANK OF WICHITA, KANSAS,
A CORPORATION, APPELLANT,

VS.

CARL C. LAMB, APPELLEE.

APPEAL FROM SUPREME COURT OF MISSOURI
DISMISSED AND CERTIORARI GRANTED.

RESPONSE OF APPELLANT TO PETITION FOR REHEARING OR TO MODIFY OPINION.

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STATEMENT.

In lieu of valid reasons to justify a rehearing, Appellee substitutes arguments foreign to the issues and to the record here and in the State courts.

The propriety of modification of the majority and dissenting opinions to conform with the limited issues presented for decision by the record is conceded. Modification by the Court *ex mero motu* is suggested as a more practical method to remedy inadvertences than Appellee's motion to modify. Modifications to limit the decision to the issues presented by the record should eliminate possible misinterpretations of important questions of procedural and substantive law and materially enhance the value of the decision as a precedent for Bench and Bar.

I.

The two questions left open on remand (Opinion, p. 6), **were not pleaded and were not in issue in the state courts. They are foreign to the issues presented by the record, The decision inadvertently overlooked controlling authorities ruling that such questions are not properly subject to determination by the State courts on remand.**

A.

The questions left open on remand were not pleaded and were not in issue in the State courts.

Appellant was lawfully entitled to judgment in the trial court, to accord the same full faith and credit to the judgment of revival as it had by law in Colorado, when the duly authenticated copy of the Colorado judgments was introduced in evidence (R. 11), because there were no valid defenses pleaded thereto. *3 Colo. St. Ann., 1935, Ch. 93, Sec. 2, p. 1036,* provides that execution may issue on original judgments, "to enforce the same, at any time within twenty years from the entry thereof." *1 Colo. St. Ann., 1935, p. 210, Ch. 6, Rule 54 (h),* provides:

> "A revived judgment must be entered within twenty years after the entry of the judgment which it

revives, *and may be enforced* and made a lien *in the same manner*, and for a like period *as an original judgment.*"

Execution may issue on the judgment of revivor to enforce the same, in the same manner and for a like period as an original judgment. It was entitled to the same full faith and credit in Missouri as it had by law in Colorado.

The Colorado statutes and decisions were judicially known to and were before the State courts by agreement of counsel (R. 12), and under *Missouri Civil Code, Section 847.54, Laws Missouri, 1945, page 353*, because of the allegations in the petition relating thereto. They are also judicially known to this Court (*A. L. I., Restatement of Conflict of Laws, Sections 624, 625, page 738*).

The pleadings (R. 1, 6), the objections and statements of Appellee's counsel (R. 9, 12), and the State court opinion (R. 19, 23), conclusively establish that the questions left open on remand were not pleaded in defense, nor were they presented to or in issue before the State courts. The foregoing record references disclose that the only purported defenses pleaded and relied upon in the State courts were based on Sec. 1038, R. S. Mo., 1939.

Appellee (R. 5, 12), contended that the original Colorado judgment was conclusively presumed to be paid and was barred by limitation under Section 1038 because the judgment of revivor was not rendered within ten years, and that the personal service of notice and of the motion to revive in Missouri, made by a deputy sheriff and by registered mail, was not "personal service," as required by Section 1038.

Appellee offered no evidence. The record does not indicate when he left Colorado nor when he came to Missouri. The statement of his counsel in the trial court (R.

12) that "*I do not know the effect of this revival in the State of Colorado,*" definitely shows that no issue was presented to cast a burden upon Appellant to establish that the judgment of revival was a new judgment. It is manifest that such judgments are new judgments under Colorado law. *3 Colo. Stat. Ann., 1935, Ch. 93,* provides that the defendant may appear and answer in the same manner complaints are required to be answered and that the court shall try and determine any issues so formed the same as any other issues made by the pleadings and shall hear any evidence necessary to decide the matter. If the court decides to revive the judgment, *in whole or in part,* it shall so order and the papers and proceedings shall be attached to the original files in the cause. To review errors in such judgments, motion for a new trial must be filed within ten days, under Rule 59. Execution may issue on such revived judgments, the same as on an original judgment. Rule 54 (h), *supra,* provides that "Revived judgments may themselves be revived in the manner herein provided."

From the face of the Colorado statutes, without the aid of the decision of its Supreme Court, it is manifest that the proceedings to revive are a continuation of the original action, but that the judgment of revivor is a new judgment, which itself may be revived, and that execution issues to enforce the judgment of revivor in the same manner as an original judgment, but that execution does not issue on the original judgment after the rendition of a judgment of revivor. It was competent for the law of Colorado to so provide and to have the same full faith and credit given thereto elsewhere as given by law in the Colorado courts.

In contrast, the Missouri statute provides for successive revivals of the original judgment, but execution issues on the original judgment and not on the judgment of re-

vival. Only the original judgment may be revived, without right of revival of a revived judgment.

The judgment of the Colorado court of general jurisdiction imported verity and was not subject to collateral attack in Colorado nor in Missouri. Personal service of process in accordance with law and Rule 4 of the Rules of Civil Procedure was recited therein. Neither the validity of such service nor of the Colorado Rule of Procedure authorizing it, was challenged as a denial of due process. The Colorado Rule is presumed to be valid as it deals with a subject within the scope of legislative power. *Hardware D. Mut. Fire Ins. Co.* v. *Glidden Co.*, 284 U. S. 151, 158, 76 L. Ed. 214, 219, and cases cited therein. *Owens* v. *Henry*, 161 U. S. 642, cited in the opinion, page 6, has no application, because the Pennsylvania judgment denied full faith and credit because of a ten year limitation statute in Louisiana, was based on two writs of *scire facias* returned "*nihil*," and not on personal service on defendant, who resided in Louisiana for some fifteen years before suit was filed in Louisiana.

It was the mandatory duty of the Missouri courts to accord full faith and credit to the Colorado judgment of revivor and to render judgment thereon as prayed, when no valid defenses were presented thereto. The Missouri Supreme Court erred in failing to reverse, with directions to the trial court to set aside its judgment and to enter judgment according to the prayer of plaintiff's petition. Its judgment should be reversed with such directions.

B.

The decision inadvertently overlooked controlling authorities ruling that the questions left open are not properly subject to determination by the State courts upon remand under its recognized procedure.

An extensive list of cases of this Court and of the Supreme Court of Missouri, are cited in *4 C. J. S., Sec. 233, pp. 438, 439*, in support of the text reading:

> "that if a defendant in the trial court, by failure to plead, to request instructions or introduce evidence, to object to instructions or evidence, or otherwise fails to present a defense which he might make, and submits issues not involving it, he will be bound in the appellate court by the case made by the pleadings and evidence *as exhibited by the record*, and cannot urge a defense which was not presented in the lower court."

4 C. J. S., Sec. 241 (a), p. 465, states:

> "One of the most important results of the rule that questions which are not raised in the court below cannot be raised in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with or different from that taken by him at the trial, and that the parties are restricted to the theory on which the case was prosecuted or defended in the court below."

Numerous cases of this and of the Missouri courts are also cited in *3 Am. Jur. 59, Sec. 287, and at p. 63, Sec. 293*, in support of the following:

> 287: "The general rule that an appellate court will consider only such questions as were raised in the lower court, and the rule requiring adherence to the theory pursued below, operate ordinarily to preclude the consideration, on appeal or review, of grounds of defense or opposition not asserted and relied on in the trial court. Accordingly, where a defendant relies on

a certain defense in the trial court, he will not be permitted on appeal, to shift his position and present a defense that was not presented in the former court.

293: The general rule that an appellate court will not consider grounds of defense not asserted in the lower court is applicable ordinarily to defenses and objections based on constitutional grounds. Thus, the question of the constitutionality of a statute, ordinance, or administrative order, cannot ordinarily be raised for the first time on appeal. An exception to this rule has been made, however, in cases involving the deprivation of life or liberty."

This Court has repeatedly ruled that it will not consider objections on Federal grounds which are not presented by the record and passed upon by the State courts in the regular course of their proceedings. *Wilson* v. *Cook*, 327 U. S. 474, 90 L. Ed. 793, 801; *Missouri ex'rel.* v. *Gehner*, 281 U. S. 313, 74 L. Ed. 870; *N. W. Bell Tel. Co.* v. *Nebraska State R. Co.*, 297 U. S. 471, 80 L. Ed. 810. By analogy, Federal grounds not presented by the record should not be injected and left open on remand, contrary to the regular course of proceedings in the State courts.

We adopt the two cases cited on page 32 of Appellee's original brief to support his contention that the question of due process in the service in the revival proceedings was not properly in the case and should not be considered by the Court.

For accuracy and to avoid possible future errors, attention is called to misinterpretation in the majority and dissenting opinion of the ruling in *Northwestern Brewers Supply Co.* v. *Vorhees*. In closing, that opinion stated:

"Therefore, since plaintiff is unable to bring his judgment under the exception of the statute, the conclusive presumption of payment must follow because the period has run. Furthermore, this action is also barred by the limitation feature of the statute."

The latter sentence is proper. The prior sentence denied the integrity of the Wisconsin judgment and obliterated the debt evidenced thereby and the judgment which was still valid in Wisconsin. *34 Am. Jur. 16, Sec. 6.*

Paragraph 3 of the dissenting opinion states the rule which generally applies to causes of action, but not to judgments. The rule is stated in *50 C. J. S. 444, Sec. 868 (a)*, as follows:

> "By the weight of authority a judgment which has been allowed to become dormant under the laws of the state where it was rendered cannot be enforced by action in another state, even though the dormant judgment is subject to revival by a suit for that purpose, since to allow such enforcement would be to give effect to that which had no effect in the state where the judgment was rendered."
>
> Cf. *Fowler* v. *Pilson*, 123 F. 2d 918, 74 App. D. C. 340, *Note 8*. Certiorari denied 316 U. S. 664.

CONCLUSION.

It is respectfully submitted that the majority opinion should be modified, beginning with the second paragraph on page 5, to state that the purported defenses based on Section 1038, did not constitute a defense. The validity of the service of process for the judgment of revival and Rule 4 of the Colorado Rule of Civil Procedure which authorized it, were not challenged as denying due process. The two questions left open on remand should be eliminated because they were not pleaded nor properly in issue on the record and are not properly subject to determination by the State court under its recognized procedure.

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